Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-04–157 OF 2002
LOW HOP BING, ABDUL MALIK ISHAK AND WAN ADNAN MUHAMAD JJCA
13 AUGUST 2009

B

Civil Procedure — Pleadings — Parties bound by — Whether Industrial Court wrong in considering unpleaded issue of victimisation

C

Labour Law — Employment — Termination of employment — Refusal to wear required attire — Habitually reporting late for work — Whether failure to promptly submit medical chits for medical leave — Whether dismissal with just cause or excuse — Whether there was condonation of alleged offence

D

Labour Law — Industrial Court — Procedure — Pleadings — Whether issues outside pleadings could be considered — Whether issue of victimisation pleaded — Whether Industrial Court wrong in finding employee was victimised — Industrial Court Rules 1967 r 9(3)

E

F

Labour Law — Industrial Court — Procedure — Whether Industrial Court given carte blanche to ignore provisions of Industrial Court Rule 1967 — Whether Industrial Court Rules allows Industrial Court to disregard technicalities and legal form — Whether complied with Industrial Court Rules 1967 — Industrial Relations Act 1967 s 30(5)

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The appellant ('the employee') was employed by the respondent ('the company') as an executive. The employee had been given warnings regarding her habitual late reporting for work, failure to promptly submit medical chits for medical leave and for refusing to dress according to the company's dress code. The company suspended the employee from work pending domestic inquiry against her, where she was found guilty of the following charges: (i) refusal to wear a collared white shirt and a bow tie; (ii) habitually reporting late for work in spite of numerous warnings; and (iii) failure to promptly submit medical chits for medical leave. The employee was thereby dismissed. The Industrial Court found that the employee was dismissed without just cause or excuse. The Industrial Court award was quashed by the High Court by way of an order of certiorari and hence this appeal. The employee

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A submitted that the learned judge erred in law and in fact in holding that the Industrial Court had relied on the unpleaded issue of victimisation. The company on the other hand argued that the learned judge was correct in holding that the Industrial Court had erroneously decided on the issue of victimisation which was neither pleaded nor supported by evidence.

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Held, dismissing the employee's appeal with costs:

(1) (per **Low Hop Bing JCA**) The Industrial Court's duty, to act according C to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form under s 30(5) of the Industrial Relations Act 1967 does not give the Industrial Court the carte blanche to simply ignore the Industrial Court Rules 1967. Section 30(5) merely allows the Industrial Court to disregard technicalities and D legal form. By way of contrast, r 9(3) of the Industrial Court Rules 1967 specifically prescribe the contents of a statement of case. These contents are certainly matters of substance (see paras 24–25); *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 and *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] E 1 MLJ 789 followed.

(2) (per **Low Hop Bing JCA**) The issue of victimisation was never pleaded at all. In the Industrial Court, this unpleaded issue did not appear to be within the contemplation of the employee and there was no evidence to support it. The Industrial Court had gone on a frolic of its own in F finding that the employee was victimised (see paras 27–29).

(3) (per **Low Hop Bing JCA**) The Industrial Court had occasioned three specific jurisdictional errors viz: (a) acting on the unpleaded issue of victimisation; (b) finding the possibility of victimisation in the absence G of positive proof; and (c) misdirecting on the standard of proof by reference to possibility instead of a balance of probabilities. Such jurisdictional errors rendered its award legally unsustainable, and as a consequence, amenable to judicial review by way of an order of certiorari (see para 30).

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(4) (per **Abdul Malik Ishak JCA**) The Industrial Court took into consideration the issue of victimisation without regard to the fact that it was not pleaded nor proved. In the absence of pleadings, evidence if any produced by the parties cannot be considered by the court and no I party should be permitted to travel beyond its pleadings (see paras 38 & 43).

(5) (per **Abdul Malik Ishak JCA**) The subject matter of the first charge was whether the employee had defied the instructions to use a collared white shirt and bow tie. Therefore, any consideration as to whether the

employee's superior or any other individual was required to wear such an attire was entirely irrelevant. The employee also had admitted that she did not wear the bow tie as directed on some occasions (see paras 46 & 49).

(6) (per **Abdul Malik Ishak JCA**) The Industrial Court held that there was a need for the production of the operations report to show the dates when the employee was late for work. The Industrial Court failed to have regard to the fact that the employee had not objected to the dates and times that were the subject matter of the charge and that the punch cards of the employee had already been produced (see para 50).

(7) (per **Abdul Malik Ishak JCA**) Condonation can only arise after the employer acquires full knowledge of the nature and circumstances of an employee's offence. An employer cannot waive the contractual right to discipline an employee if the employer is not aware that such a right has accrued to the employer. The employer only became aware of the employee's late coming to work in July 1997 and not in March to June 1997 as alleged. Consequently, the doctrine of condonation could not be invoked to the detriment of the employer (see para 56).

[Bahasa Malaysia summary

Perayu ('pekerja tersebut') telah diambil bekerja oleh responden ('syarikat tersebut') sebagai seorang eksekutif. Pekerja tersebut telah diberikan amaran berkaitan tabiat lewat melaporkan diri untuk bekerja, kegagalan mengemukakan sijil sakit untuk cuti sakit dengan segera dan keengganan memakai baju mengikut kod pakaian syarikat tersebut. Syarikat tersebut telah menggantung pekerja tersebut daripada kerja sementara menunggu siasatan domestik selesai terhadapnya, di mana dia telah didapati bersalah menurut pertuduhan-pertuduhan berikut: (1) keengganan memakai kemeja putih berkolar dan tali leher kupu-kupu; (2) kebiasaan lewat melapor diri untuk bekerja meskipun telah diberi beberapa amaran; dan (3) kegagalan mengemukakan sijil sakit untuk cuti sakit dengan segera. Pekerja tersebut dengan itu telah dipecat. Mahkamah Perusahaan mendapati bahawa pekerja tersebut telah dipecat tanpa sebab atau alasan yang adil. Award Mahkamah Perusahaan telah dibatalkan oleh Mahkamah Tinggi melalui perintah certiorari dan justeru itu rayuan ini. Pekerja tersebut menghujahkan bahawa hakim yang bijaksana terkhilaf dari segi undang-undang dan fakta apabila memutuskan bahawa Mahkamah Perusahaan telah bergantung kepada isu pemangsaan yang tidak diplidkan. Syarikat tersebut sebaliknya berhujah bahawa hakim yang bijaksana adalah betul dalam memutuskan bahawa Mahkamah Perusahaan telah tersilap memutuskan tentang isu pemangsaan yang tidak diplidkan mahupun disokong oleh keterangan.

Diputuskan, menolak rayuan pekerja dengan kos:

(1) (oleh **Low Hop Bing HMR**) Tugas Mahkamah Perusahaan, untuk bertindak menurut ekuiti, hati nurani yang baik dan merit kukuh kes tanpa mengira dari segi teknikal dan bentuk perundangan di bawah s 30(5) Akta Hubungan Perusahaan 1967, tidak memberikan Mahkamah Perusahaan carta blanche untuk tidak menghiraukan Kaedah-Kaedah Mahkamah Perusahaan 1967. Seksyen 30(5) hanya membenarkan Mahkamah Perusahaan tidak menghiraukan dari segi teknikal dan bentuk perundangan. Sebaliknya, k 9(3) Kaedah-Kaedah Mahkamah Perusahaan 1967 dengan khusus menetapkan kandungan-kandungan kenyataan kes. Kandungan-kandungan berikut sememangnya perkara-perkara penting (lihat perenggan 24–25); *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 dan *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789 diikut.

(2) (oleh **Low Hop Bing HMR**) Isu pemangsaan tidak pernah diplidkan langsung. Dalam Mahkamah Perusahaan, isu yang tidak diplidkan ini bukan di dalam pertimbangan pekerja tersebut dan tiada keterangan untuk menyokongnya. Mahkamah Perusahaan telah dengan sendirinya tersilap dalam penemuannya bahawa pekerja tersebut telah menjadi mangsa (lihat perenggan 27–29).

(3) (oleh **Low Hop Bing HMR**) Mahkamah Perusahaan melakukan tiga kesilapan bidang kuasa spesifik dengan: (a) bertindak ke atas isu pemangsaan yang tidak diplidkan; (b) membuat penemuan kemungkinan pemangsaan tanpa kehadiran bukti yang kukuh; dan (c) salah arah tentang piawai pembuktian dengan merujuk kepada kemungkinan dan bukan imbangan kebarangkalian. Kesilapan bidang kuasa sebegini menyebabkan awardnya tidak boleh dikekalkan secara sah, dan akibatnya, memerlukan semakan kehakiman melalui perintah certiorari (lihat perenggan 30).

(4) (oleh **Abdul Malik Ishak HMR**) Mahkamah Perusahaan telah mempertimbangkan isu pemangsaan tanpa menghiraukan hakikat bahawa ia tidak diplidkan ataupun dibuktikan. Tanpa kehadiran pliding-pliding tersebut, keterangan jika ada yang dikemukakan oleh pihak-pihak tidak boleh dipertimbangkan oleh mahkamah dan mana-mana pihak tidak patut dibenarkan melampaui pliding-pliding tersebut (lihat perenggan 38 & 43).

(5) (oleh **Abdul Malik Ishak HMR**) Perkara utama dalam pertuduhan pertama adalah sama ada pekerja tersebut mengingkari arahan-arahan untuk menggunakan kemeja putih berkolar dan tali leher kupu-kupu. Oleh itu, apa-apa pertimbangan berhubung sama ada pegawai atasan pekerja tersebut atau mana-mana individu lain dikehendaki memakai

pakaian sedemikian tidak relevan langsung. Pekerja tersebut juga telah mengakui bahawa dia tidak memakai tali leher kupu-kupu sepertimana diarahkan beberapa kali (lihat perenggan 46 & 49).

(6) (oleh **Abdul Malik Ishak HMR**) Mahkamah Perusahaan memutuskan bahawa laporan operasi perlu dikemukakan untuk menunjukkan tarikh-tarikh bila pekerja tersebut lewat datang bekerja. Mahkamah Perusahaan telah gagal untuk mengambil kira fakta bahawa pekerja tersebut tidak membantah kepada tarikh-tarikh dan masa-masa yang menjadi perkara utama pertuduhan dan bahawa kad tebuk pekerja tersebut telahpun dikemukakan (lihat perenggan 50).

(7) (oleh **Abdul Malik Ishak HMR**) Sikap membiarkan hanya boleh timbul setelah majikan tersebut mempunyai pengetahuan sepenuhnya tentang sifat dan keadaan kesalahan pekerja tersebut. Majikan tidak boleh mengetepikan hak kontraktual untuk mendisiplinkan pekerja jika dia tidak sedar bahawa dia berhak mendisiplinkan pekerjanya. Majikan hanya sedar pekerja tersebut lewat datang bekerja pada bulan Julai 1997 dan bukan pada bulan Mac hingga Jun 1997 seperti yang didakwa. Berikutan itu, doktrin sikap membiarkan tidak boleh dibahagikan kerana ia hanya akan menjejaskan majikan (lihat perenggan 56).]

Notes

For cases on parties bound by pleadings, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5492–5495.

For cases on procedure, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1522–1535.

For cases on termination of employment, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1161–1239.

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2008] 5 MLJ 773; [2008] 6 CLJ 473; [2008] 6 AMR 190, CA (refd)

Anjalai Ammal & Anor v Abdul Kareem [1969] 1 MLJ 22, FC (refd)

Banning v Wright (Inspector of Taxes) [1972] 1 WLR 972, HL (refd)

Beattie v Parmenter (1889) 5 TLR 396 (refd)

Bremer Handelsgesellschaft MBH v Vanden Avenne-Izegem PVBA [1978] 2 Lloyd's Rep 109, HL (refd)

Central London Property Trust Ltd v High Trees House Ltd [1947] KB 130 (refd)

Chartered Bank, The v Yong Chan [1974] 1 MLJ 157, FC (refd)

Clouston & Co Ltd v Corry [1906] AC 122, PC (refd)

Federal Supply and Cold Storage Co v Augehrn (1910) 103 LT 150 (refd)

Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd [1987] 1 MLJ 302, SC (refd)

Goon Kwee Phoy v J & P Coats (M) Bhd [1981] 2 MLJ 129, FC (refd)
Hari Chand v Daulat Ram AIR 1987 SC 94 (refd)
K Kanakarathnam v A Perumal & Anor AIR 1994 Mad 247 (refd)
Koh Siak Poo v Sayang Plantation Bhd [2002] 1 MLJ 65, CA (refd)
Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789, SC (folld)
Lever Brothers Ltd & Ors v Bell & Anor [1931] 1 KB 557 (refd)
Lucas v Premier Motors Ltd (1928) 4 DLR 526 (refd)
LW Middleton v H Playfair AIR 1925 Cal 87 (refd)
Manager, Scudai Estate, Johore Bahru, The v Narayanan [1960] MLJ 162, HC (refd)
Meyrick v Stirling Bros Ltd [1899–1901] 1–3 WAR 51 (refd)
Milan Auto Sdn Bhd v Wong Seh Yen [1995] 3 MLJ 537, FC (refd)
Muniandy & Anor v Muhammad Abdul Kader & Ors [1989] 2 MLJ 416, SC (refd)
Narayanan v Kannamah [1993] 3 MLJ 730, HC (refd)
National Union of Plantation Workers v Kumpulan Jerai Sdn Bhd, Rengam [2000] 2 MLJ 144; [2000] 1 CLJ 681, CA (refd)
Phillips v Foxall (1872) LR 7 QB 666 (refd)
Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600, CA (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (folld)
Ram Sarup Gupta (decd) by LRs v Bishun Narain Inter College & Ors AIR 1987 SC 1242 (refd)
Ria Enterprise & Ors v MBf Finance Bhd [2001] 1 CLJ 687, HC (refd)
S Manickam & Ors v Ismail bin Mohamad & Ors [1997] 2 MLJ 90, HC (refd)
Superintendent of Lands & Surveys (4th Div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185; [1994] 3 CLJ 567, SC (refd)
Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor [1993] 3 MLJ 633, HC (refd)
Vinod Kumar Arora v Smt Surjit Kaur AIR 1987 SC 2179 (refd)
Wisma Punca Emas Sdn Bhd v Dr Donal R O'Holohan [1987] 1 MLJ 393, SC (refd)
Wong See Leng v C Saraswathy Ammal [1954] MLJ 141, CA (refd)
Yeung Chee-Kiu v Lam Chee Trading As Yau Fat Furniture Co [1966] HKDCLR 65 (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

Legislation referred to

Evidence Act 1950 s 114(g)
Industrial Court Rules 1967 r 9, 9(1), (3), Form H
Industrial Relations Act 1967 ss 20, 30(5)
Rules of the High Court 1980 O 18 rr 7(1), 8(1)

K Chandra (K Chandra & Co) for the appellant.
Suganthi Singam (Shearn Delamore & Co) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

[1] The appellant ('the employee') appeals to this court against the decision of the Kuala Lumpur High Court in quashing the award of the Industrial Court.

FACTUAL BACKGROUND

[2] The employee joined the respondent ('the company') on 28 September 1983 as a junior receptionist at a salary of RM155 per month.

[3] She was promoted as senior receptionist on 27 August 1984 and then as front office executive with effect from 16 May 1991.

[4] On 1 March 1997, the employee was transferred to the company's Dulang Coffee House as an executive under the food & beverage ('f & b') department vide letter dated 27 February 1997. Her last drawn salary was RM1,659 per month. The employee objected to the transfer on the ground that she had no experience or knowledge of f & b. However, she reported for duty under protest.

[5] When the employee was in the front office, she had been challenging the company's warning letters given to her for habitually arriving late for work and failure to promptly submit medical chits for medical leave. Be that as it may, she complained that, unlike other employees, she was not given the annual increment for the year 1997; and she was given a one-month bonus, while other employees were given two months'.

[6] After the employee's transfer to the f & b department, the company gave her the job specifications, dated 11 March 1997, which include, inter alia, the following:

> You are to ensure that you and your staff are well groomed reporting for duty. Personal grooming is of utmost importance and all staff should be in well-dressed attire.

[7] Subsequently, the f & b manager sent the employee a memo dated 12 March 1997 whereby the employee was directed to wear uniform, and, for that purpose, the company gave her two skirts, one jacket and one white blouse.

[8] The employee, apparently dissatisfied, alleged that other female executives in the f & b department did not have to wear uniforms and that she was the only executive who had been asked to do so.

[9] The f & b manager then issued a memo dated 20 March 1997, requiring the employee to wear a collared white blouse and a bow tie. The employee alleged that the f & b manager was degrading the employee's position as an executive to that of a waitress, claiming that in the company, only waiters and waitresses wear bow ties. Under protest, the employee wore the uniform and the bow tie, except when she lent the bow tie to other staff. By letter dated 1 August 1997, the f & b manager gave the employee a warning, for not wearing a bow tie. In reply, the employee claimed that she did wear a bow tie.

[10] The company suspended the employee from work, with effect from 17 August 1997, pending domestic inquiry into five charges against her.

[11] Charge three (3) was subsequently dropped. The employee was found guilty of the other four charges, the particulars of which are as follows:

charge (1): in total defiance of the instruction and warning issued on 20 March 1977 by the superior, Mr Vincent Nonis, and refusal to wear a collared white shirt and a bow tie;

charge (2): wilfully and without lawful excuse, habitually reported late for work in spite of numerous warnings;

charge (3): (dropped); and

charges (4) and (5): failure to promptly submit medical chits for medical leave.

[12] After the domestic inquiry, the employee was dismissed with effect from 28 August 1997.

[13] The dismissal was referred to the Industrial Court which found that the employee was dismissed without just cause or excuse. The Industrial Court award was quashed by the High Court by way of an order of certiorari.

[14] After hearing the employee's appeal, we found that the High Court had correctly quashed the Industrial Court award. We dismissed the employee's appeal with costs. Our grounds now follow.

VICTIMISATION: NOT PLEADED AND NOT PROVED

[15] The employee's learned counsel Mr K Chandra submitted that the

learned judge erred in law and in fact in holding that the Industrial Court had relied on the unpleaded issue of victimisation. He referred to *National Union of Plantation Workers v Kumpulan Jerai Sdn Bhd, Rengam* [2000] 2 MLJ 144; [2000] 1 CLJ 681 (CA); and the provisions of equity and good conscience under s 30(5) of the Industrial Relations Act 1967 (a reference hereinafter to a section is a reference to that section in the Industrial Relations Act 1967).

[16] Ms Suganthi Singam, the company's learned counsel, argued that the learned judge was correct in holding that the Industrial Court had erroneously decided on the issue of victimisation which is neither pleaded nor supported by evidence. She stressed that parties are bound by their pleadings, to which the Industrial Court must confine itself. Support was sought in:

(1) *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 at p 178; [1997] 1 CLJ 147 (FC) at p 162;

(2) *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789 (SC); and

(3) r 9 of the Industrial Court Rules 1967 ('r 9').

[17] The above contentions flow from two different schools of thought. The first is reflected in *National Union of Plantation Workers*, cited for the appellant, where para 4 of the statement of case pleaded that the employees' dismissal was without just cause or excuse. The issue of waiver or condonation was not pleaded by the employees. The Industrial Court found in favour of the employees on the ground that there was waiver or condonation, by the company, of the employees' absence from work. The High Court held that the Industrial Court had arrived at its finding based on an unfounded assumption, without any evidence to that effect. In relation to the company's contention that the issue of waiver or condonation has not been pleaded in the statement of case, and should not be considered, this court held that even if the issue of condonation was not specifically pleaded, it was fully argued in the Industrial Court and the High Court without any objection and so it would be too late in the day for the company to contend that this issue could not be relied on by the employees.

[18] *National Union of Plantation Workers* had followed the judgment of the (then) Supreme Court in *Superintendent of Lands & Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185; [1994] 3 CLJ 567 which dealt with a 'small point of practice and procedure relating to evidence at variance with or departing from pleading'. The respective defence of the defendants did not particularise the reason for denying the allegations that the plaintiffs have acquired customary rights. In the final submissions, after the conclusion of all evidence, an objection was raised by the plaintiffs for the first time that such defences were not pleaded. The learned trial judge

A invoked O 18 rr 7(1) and 8(1) of the Rules of the High Court 1980 and sustained the plaintiffs' objection. On appeal, the (then) Supreme Court disagreed and held in essence that:

(1) when evidence represented a departure from the pleadings, it should be
B objected to when and where it was adduced and it would be too late when it was objected to later on in the final submission at the close of the evidence; and

(2) evidence bearing on the two alleged defences was not such a radical
C departure but a mere development of what had been alleged by the defendants.

[19] Our analysis of the judgment in *Superintendent of Lands & Surverys* shows that it was not concerned with the construction of s 30(5) and r 9.
D Instead, it revolves around the procedure generally applicable to ordinary civil litigation. It does not relate to the specialised domain of industrial jurisprudence.

[20] With particular reference to industrial jurisprudence, there are two
E weighty authorities, of the (then) apex court, which reflect the second school of thought, and at variance with the approach adopted in *National Union of Plantation Workers*. The first is *R Rama Chandran*, where the Industrial Court did not consider the issues raised in the parties' pleadings. At p 178b–d (MLJ); p 162b–e (CLJ), Eusoff Chin CJ (Malaya) (as he then was) set out the
F relevant principle as follows:

> It is trite law that a party is bound by its pleadings. The Industrial Court must scruntinise the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgment having strict regards to the issues.
G It is true that the Industrial Court is not bound by all the technicalities of a civil court (s 30 of the Industrial Relations Act 1967) but it must follow the same general pattern. The object of pleadings is to determine what are the issues and to narrow the area of conflict. The Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight
H of the issues, admit evidence irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion. The Industrial Court must all times keep itself alert to the issues and attend to matters it is bound to consider.

[21] The second authority was established by another coram of the (then)
I Supreme Court in *Kumpulan Perangsang Selangor Bhd*, which followed the principle propounded in *R Rama Chandran*. There, the Industrial Court had acted on a ground which was not advanced in the pleaded case. The award by the Industrial Court was quashed: per Gopal Sri Ram JCA (now FCJ) speaking for the (then) Supreme Court at p 801F–H.

[22] The existence of the two different schools of thought makes it imperative for us to indicate our choice for the better view. With respect, we subscribe to and agree with the principle propounded in the second school of thought which sets out the correct judicial approach relating to the specialised domain of industrial jurisprudence.

[23] In our view, the Industrial Court's duty, to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form under s 30(5), does not give the Industrial Court the carte blanche to simply ignore the Industrial Court Rules 1967 made under the principal Act. Section 30(5) merely allows the Industrial Court to disregard technicalities and legal form eg Form H contained in r 9(1) which merits reproduction as follows:

Statement of Case

(1) Upon a case being brought before the Court, the Registrar shall immediately serve notice in Form H on one or other of the parties as the President shall direct to submit to the Court a Statement of Case.

[24] By way of contrast, r 9(3) specifically prescribes the contents of a statement of case. These contents are certainly matters of substance. It reads:

(3) Such Statement of Case shall be confined to the issues which are included in the case referred to the Court by the Minister or in the matter required to be determined by the Court under the provisions of the Act and shall contain:

(a) a statement of all relevant facts and arguments;

(b) particulars of decisions prayed for;

(c) an endorsement of the name of the first party and of the first party and of his address for service; and

(d) as an appendix or attachment, a bundle of all relevant documents relating to the case.

[25] The importance of the employee's statement of case pleaded in the Industrial Court makes it immensely important for us to reproduce it in extenso as follows:

STATEMENT OF CASE

1 The parties to the dispute are Hotel Excelsior (M) Sdn Bhd (hereinafter referred to as 'the Company') and Ranjit Kaur A/P Gopal

A Singh (hereinafter referred to as 'the Claimant') who joined the services of the company on 27th September 1983.

2 The dispute is over the dismissal of the Claimant from the services of the company as its F&B Executive. The Claimant's last drawn salary was RM1,659 per month.

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3.1 The Claimant joined the company as a Receptionist and from May 1991, the Claimant was promoted as the Company's Front Office Executive until February 1997. By letter dated 27th February 1997, the Claimant was 'transferred' in the F&B Department as the F&B Executive.

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3.2 The Claimant protested at this purported transfer both, orally and in writing the following day but reported for work in the new post under protest.

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3.3 Subsequent to this, there was an exchange of correspondence between the Claimant and the Company on alleged matters like uniform, medical leave and insubordination.

3.4 By letter dated 17th August 1997, the Company preferred five charges against the Claimant and purported to hold an inquiry on 23rd August 1997.

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3.5 By letter dated 28th August 1997, the Company summarily dismissed the Claimant with effect from the same date. A copy of this letter is annexed hereto marked 'C1'.

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3.6 The Claimant states that her purported transfer the to Front Office and the subsequent events leading to her dismissal were actuated by mala fides, and was an unfair labour practice.

4 The Claimant therefore contends and will contend at this hearing that the said dismissal is without any just cause or excuse.

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5 Further or in the alternative the Claimant will contend that the said dismissal is contrary to the principles of natural justice, equity, good conscience and an unfair labour practice which ought to be struck down as such by the Court.

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6 The Claimant therefore prays for reinstatement to her former position in the Company as Front Office Executive without loss of any benefits, monetary or otherwise whatsoever.

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[26] A plain reading of the statement of case reveals that the issue of victimisation was never pleaded at all. For all intents and purposes, in the Industrial Court, this unpleaded issue does not appear to be within the contemplation of the employee.

[27] Quite apart from the pleading, a close scrutiny of the Industrial Court award shows that there was no evidence to support the unpleaded issue of victimisation. At p 409 of the appeal record, the Industrial Court concluded as follows:

> *This court of course cannot uphold a plea of victimisation in the absence of positive proof* but as court of social justice it is bound to give due consideration to the *possibility of victimisation* and should any doubt arise it should give the benefit of the doubt to the employee after taking into consideration the whole of the evidence and the particular circumstances surrounding each case. (Emphasis added.)

[28] On the basis of this specific conclusion by the Industrial Court, in relation to the unpleaded issue of victimisation for which there was no positive proof, we are of the view that the Industrial Court had gone on a frolic of its own in finding that the employee had been victimised. It is manifestly wrong for the Industrial Court to proceed to embark on 'the possibility of victimisation' when it should have been concerned with *probabilities* ie *on a balance of probabilities*. This principle setting out the standard of proof is both fundamental and elementary.

[29] The Industrial Court has clearly occasioned three specific jurisdictional errors vis (a) acting on the unpleaded issue of victimisation; (b) finding the possibility of victimisation in the absence of positive proof; and (c) misdirecting on the standard of proof by reference to possibility instead of a balance of probabilities. Such obvious jurisdictional errors of the Industrial Court render its award legally unsustainable, and as a consequence, amenable to judicial review by way of an order of certiorari.

CONCLUSION

[30] In the circumstances, we dismissed the employee's appeal with costs, and affirmed decision of the High Court. Deposit to the company (respondent) on account of the costs.

[31] My learned brother Abdul Malik Ishak JCA has also prepared his judgment in support of mine.

Abdul Malik Ishak JCA:

[32] This is my supporting judgment to that of my learned brother Low Hop Bing JCA who has lucidly set out the facts in extenso in his well written judgment and I need not dwell on the facts except when the occasion calls for it.

[33] By way of a representation under s 20 of the Industrial Relations Act 1967, the appellant employee's matter was referred to the Industrial Court for adjudication. The Industrial Court heard the matter and held that the appellant employee had been dismissed without cause or excuse. The respondent employer was ordered to pay back wages in the sum of RM42,304.50 and compensation in lieu of reinstatement in the sum of RM21,567.

[34] Aggrieved by the decision of the Industrial Court, the respondent employer filed a judicial review proceeding to quash the said award. The High Court, after hearing arguments, held that the Industrial Court had erred in law and/or had acted in excess of its jurisdiction by taking into consideration irrelevant matters, and had failed to take relevant matters into consideration, failed to consider the pleadings of the parties, and had misdirected itself by asking the wrong questions in handing down its award. Consequently, the High Court quashed the said award. This prompted the appellant employee to file an appeal to this court.

[35] This court has said in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2008] 5 MLJ 773 at p 774 that:

> The court's sole function in judicial review proceedings had always been to scrutinise the decision making process and not to question the decision itself. The accepted legal position in England, Hong Kong and Malaysia was to quash the decisions and thereafter to remit the cases to the original decision maker to reconsider the matter. However, in recent years the Malaysian courts have become bold with regard to hitherto accepted principles relating to judicial review in that they have questioned not only the process but also the decision itself and where necessary substituted their own views for those of the decision maker. In short the Malaysian courts have not stopped at quashing and remitting the case back to the decision maker but have assumed the jurisdiction to proceed ahead and take the bold step of granting the consequential relief, which practice is endorsed as necessary to meet the ends of justice.

[36] Incidentally, the same case was also reported in two other popular local law journals which carried the following citations: [2008] 6 AMR 190 and [2008] 6 CLJ 473.

[37] It goes without saying that the High Court had rightly exercised its judicial review powers according to the law and had rightly quashed the award of the Industrial Court.

[38] When the Industrial Court took into consideration the issue of victimisation, that was done without regard to the fact that it was not pleaded

nor proved. The appellant employee did not rely on the issue of victimisation as a basis for her termination. In considering whether there was victimisation, the Industrial Court had erroneously relied on an unpleaded fact. The appellant employee's statement of claim did not plead victimisation nor did it make any reference to the particulars or details of victimisation.

[39] It is a correct statement of the law to say and I so say that the practice of the courts is to consider and deal with the legal result of the pleaded facts although the particular legal result may not be stated in the pleading (*Koh Siak Poo v Sayang Plantation Bhd* [2002] 1 MLJ 65 (CA) ; *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600; and *Lever Brothers Ltd & Ors v Bell & Anor* [1931] 1 KB 557). Of course, of utmost importance is the principle that the parties are bound by their pleadings. What this means is this. That the court is not entitled to decide a suit on a matter which is not pleaded and that the trial of the suit is solely confined to the pleadings (*Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 at p 154).

[40] Generally, pleadings operate to define and delimit with absolute clarity and precision the real matters in controversy between the parties. This would enable the parties to prepare their respective cases and the court too will be able to adjudicate the case with ease (*S Manickam & Ors v Ismail bin Mohamad & Ors* [1997] 2 MLJ 90; *Narayanan v Kannamah* [1993] 3 MLJ 730; *Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22).

[41] The right to be informed of any adverse point so that the other side has the opportunity of rebutting it gives rise to the fundamental rule of natural justice (*Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416 at p 418; *Wisma Punca Emas Sdn Bhd v Dr Donal R O'Holohan* [1987] 1 MLJ 393; *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302; *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633). According to the case of *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157 as well as the case of *Ria Enterprise & Ors v MBf Finance Bhd* [2001] 1 CLJ 687, any judgment decided on an issue that was not raised in the pleadings, that judgment can be set aside and a new trial ordered.

[42] In regard to the objects of pleadings, Buhagiar J, in *Wong See Leng v C Saraswathy Ammal* [1954] MLJ 141 at p 142 had this to say:

> Now as stated in *Bullen and Leake's Precedents, of Pleadings*, (10th Ed) at p 1:
>
> > The principal objects of pleadings are firstly, to define the issues of fact and questions of law to be decided between the parties; secondly, to give to each of them distinct notice of the case intended to be set up by the other and thus to prevent either party from being taken by surprise at the trial; and thirdly, to

A provide a brief summary of the case of each party, which is readily available for reference, and from which the nature of the claim and defence may be easily apprehended, and constitute a permanent record of the questions raised in the action, and of issues decided therein, so as to prevent future litigation upon matters already adjudicated upon between the litigants.

B

[43] In the absence of pleadings, evidence if any produced by the parties, cannot be considered by the court and no party should be permitted to travel beyond its pleadings. All the necessary and material facts should be pleaded C by the party in support of the case set up by the said party (*Ram Sarup Gupta (decd) by LRs v Bishun Narain Inter College & Ors* AIR 1987 SC 1242; *K Kanakarathnam v A Perumal & Anor* AIR 1994 Mad 247). According to the case of *Hari Chand v Daulat Ram* AIR 1987 SC 94, no evidence can be led on a fact not pleaded. Neither is it open to the parties to give up its case set D out in the pleadings and propound an entirely new and different case (*Vinod Kumar Arora v Smt Surjit Kaur* AIR 1987 SC 2179 at p 2183).

[44] Additionally, r 9 of the Industrial Court Rules 1967 supports the E proposition that all relevant facts must be contained in the statement of case. Here, there was a glaring absence of any pleaded facts relating to the disparity in the payment of bonus in order to give rise to a claim of victimisation and neither was there a failure to reply to the appellant employee's letter that would amount to victimisation. At any rate, the discretion to pay the bonus F can never amount to victimisation.

[45] Since the issue of victimisation ought not to be considered by the Industrial Court, I am of the considered view that the High Court had acted within its jurisdiction in issuing an order of certiorari to quash the decision G of the Industrial Court.

[46] Next, the subject matter of the first charge was whether the appellant employee had defied the instructions to use a collared white shirt and bow tie H despite a warning issued on 20 March 1997 by the appellant employee's superior. That being the case, any consideration as to whether the appellant employee's superior or any other individual was required to wear such an attire was entirely irrelevant.

I **[47]** It must be noted that the High Court had correctly held that the Industrial Court's consideration as to whether the appellant employee's superior was required to wear a bow tie was an irrelevant consideration bearing in mind that there was evidence before the Industrial Court that the appellant employee's superior had given verbal as well as written instructions

by way of memorandums dated 20 March 1997 and 1 August 1997 to be attired in proper uniform. But, unfortunately the appellant employee remained recalcitrant.

[48] On the available evidence, the decision of the Industrial Court was misplaced and erroneous when it placed reliance on the attire of the appellant employee's superior as justification in respect of the appellant employee's refusal to use the bow tie.

[49] There was also evidence to show that the appellant employee had admitted that she did not wear the bow tie as directed on some occasions and that when she lent her bow tie to her staff who did not bring their bow tie, she would instead be wearing a round necked white blouse. Such an admission by the appellant employee clearly contravened the directive to use a collared white shirt. The compelling evidence clearly justified the High Court to issue an order of certiorari. The decision of the Industrial Court suffers from a serious jurisdictional defect and is a nullity in law. The High Court was correct in quashing the award of the Industrial Court.

[50] Next, the Industrial Court held that there was a need for the production of the operations report to show the dates when the appellant employee was late for work despite the production of the appellant employee's punch cards as evidence. In arriving at such a conclusion, the Industrial Court had failed to have regard to the fact that the appellant employee had not objected to the dates and times that were the subject matter of the charge and that the punch cards of the appellant employee had already been produced.

[51] The appellant employee held the view that if she left her place of employment late, she was entitled to come late. So, the operations report would not have served any purpose at all because the appellant employee did not dispute that she came late and that she had excuses to do so. Consequently, the Industrial Court had erroneously invoked s 114(g) of the Evidence Act 1950.

[52] Next, the Industrial Court also concluded that the respondent employer was practising double standards in electing to punish the appellant employee and not another and for that reason, the Industrial Court held that the respondent employer had acted unreasonably. But, sad to say, this was not the issue that was raised by the appellant employee in the pleadings and so it was an irrelevant consideration. It must be borne in mind that irrespective of whether or not the respondent employer chose to discipline another individual, this did not absolve the appellant employee from her misconduct.

The High Court was correct in issuing an order of certiorari because it was not for the appellant employee to question the respondent employer's election of whom to discipline.

[53] Next, in regard to the Industrial Court's conclusion that the respondent employer had condoned the appellant employee's conduct, this was in direct contradiction to the evidence which was led before the Industrial Court. The respondent employer's witness had given evidence that he had not been aware of the appellant employee's late coming to work in March to June 1997 and that it was only in July 1997 that the respondent employer learnt of the full extent of the appellant employee's absence from work. For these reasons, the High Court was correct in holding that the Industrial Court had misapplied the doctrine of condonation because condonation would only come into play if the respondent employer had been fully aware of the appellant employee's late coming to work and nonetheless elected to do nothing about it. Here, the respondent employer had adduced evidence to show that the appellant employee had been warned about her conduct in coming to work late. Thus, the erroneous application of the doctrine of condonation by the Industrial Court amounted to an error of law that entitled the High Court to make an order of certiorari.

[54] I have this to say in regard to the doctrine of condonation. It has its origins in the common law (*Phillips v Foxall* (1872) LR 7 QB 666 at p 680; and *Beattie v Parmenter* (1889) 5 TLR 396 at p 397). It has been applied in India (*LW Middleton v H Playfair* AIR 1925 Cal 87 at p 92). Our courts too have applied it (*The Manager, Scudai Estate, Johore Bahru v Narayanan* [1960] MLJ 162). New Zealand courts also applied the doctrine vigorously (*Clouston & Co Ltd v Corry* [1906] AC 122). Likewise, it has been applied in Canada (*Lucas v Premier Motors Ltd* (1928) 4 DLR 526) as well as in South Africa (*Federal Supply and Cold Storage Co v Augehrn* (1910) 103 LT 150). It has also been applied in Australia (*Meyrick v Stirling Bros Ltd* (1899–1901) 1–3 WAR 51). And Hong Kong too has applied it (*Yeung Chee-Kiu v Lam Chee Trading As Yau Fat Furniture Co* [1966] HKDCLR 65 at p 68).

[55] The doctrine of condonation is often associated and designated as a waiver.

[56] From the long line of authorities, condonation is essentially the employer excusing the employee and dispensing with the employer's right to punish the employee for misconduct or breach of a duty by an employee. However, an employer cannot, at any time after the employer has condoned the offence, punish the employee for that offence provided the employee does not repeat the offence. If the employee repeats the offence, the condoned offence revives and the employee can be punished for it.

[57] Again from the long line of authorities, the following principles of condonation can be distilled. The doctrine of condonation is enforceable for this simple reason. It prevents an employer from punishing an employee for a breach of a contractual duty that the employer has condoned and this flows from the argument that it is unconscionable or inequitable for the employer to be permitted to deny the effect of the employer's words or conduct. The starting point of this argument begins with the case of *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 and culminating in the case of *Bremer Handelsgesellschaft MBH v Vanden Avenne-Izegem PVBA* [1978] 2 Lloyd's Rep 109.

[58] The employee is entitled by virtue of the doctrine of condonation to plead the employer's abandonment of the employer's contractual right to discipline the employee by way of confession and avoidance if the employer attempts to subsequently reassert that right (per Lord Hailsham of Marylebone LC in *Banning v Wright (Inspector of Taxes)* [1972] 1 WLR 972 at p 975). But if the employee repeats the offence, the employer is entitled to discipline and punish the employee.

[59] The long line of authorities also say that condonation can only arise after the employer acquires full knowledge of the nature and circumstances of an employee's offence. It must be borne in mind that an employer cannot waive the contractual right to discipline an employee if the employer is not aware that such a right has accrued to the employer. Here, the respondent employer only became aware of the appellant employee's late coming to work in July 1997 and not in March to June 1997, as alleged. Consequently, the doctrine of condonation cannot be invoked to the detriment of the respondent employer. The High Court was right when it quashed the award of the Industrial Court.

[60] Finally, I have this to say. The High Court was correct in holding that the Industrial Court had asked itself the wrong question when faced with a representation pursuant to s 20 of the Industrial Relations Act 1967. Pursuant to that representation, the function of the Industrial Court was to determine whether the misconduct committed by the appellant employee had been established by the respondent employer. Raja Azlan Shah CJ (Malaya) (as His Majesty then was) explained the correct approach in *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129 (FC) at p 136, in this way:

> Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as

A a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

B **[61]** Mohamed Azmi FCJ, delivering the grounds of judgment for the Federal Court in *Milan Auto Sdn Bhd v Wong Seh Yen* [1995] 3 MLJ 537 (FC) at pp 542–543, aptly sets out the functions of the Industrial Court in a reference under s 20 of the Industrial Relations Act 1967 in this manner:

C As pointed out by this court recently in *Wong Yuen Hock v Hong Leong Assurance Sdn Bhd* [1995] 2 MLJ 753, the function of the Industrial Court in dismissal cases on a reference under s 20 is two fold; first, to determine whether the misconduct complained of by the employer has been established, and secondly, whether the proven misconduct constitutes just cause or excuse for the dismissal. Failure to
D determine these issues on the merits would be a jurisdictional error which would merit interference by certiorari by the High Court.

[62] It goes without saying that I must now make those orders made by my learned brother Low Hop Bing JCA.

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Appeal dismissed with costs.

Reported by Kanesh Sundrum

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